Article 8. Financial Requirements

§66265.140. Applicability.

(a) The requirements of sections 66265.142, 66265.143, and 66265.147 through 66265.148 apply to owners or operators of all hazardous waste facilities, as defined in section 66260.10, except as provided otherwise in this article.

(b) The requirements of sections 66265.144 and 66265.146 apply only to owners and operators of hazardous waste facilities which are:

(1) disposal facilities;

(2) tank systems that are required under section 66265.197 to meet the requirements for landfills; and

(3) containment buildings that are required under section 66265.1102 to meet the requirements for landfills.

(c) States and the Federal government are exempt from the requirements of this article.

(d) For purposes of this article, state government shall not include municipal, local, city, county, city-county special district government or any subdivisions thereof.

NOTE: Authority cited: Sections 25150, 25159, 25159.5, 25179.6, 25245 and 58012, Health and Safety Code. Reference: Sections 25159, 25159.5, 25245 and 58012, Health and Safety Code; 40 CFR Section 265.140.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).
2. Amendment of subsection (b), designation and amendment of subsections (b)(1)-(2), new subsection (b)(3) and amendment of Note filed 10-24-94 as an emergency; operative 10-24-94 (Register 94, No. 43). A Certificate of Compliance must be transmitted to OAL by 2-20-95 or emergency language will be repealed by operation of law on the following day.
3. Amendment of subsection (b), designation and amendment of subsections (b)(1)-(2), new subsection (b)(3) and amendment of Note refiled 2-21-95 as an emergency; operative 2-21-95 (Register 95, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-21-95 or emergency language will be repealed by operation of law on the following day.
4. Amendment of subsection (b), designation and amendment of subsections (b)(1)-(2), new subsection (b)(3) and amendment of Note refiled 6-19-95 as an emergency; operative 6-19-95 (Register 95, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-17-95 or emergency language will be repealed by operation of law on the following day.
5. Amendment of subsection (b), designation and amendment of subsections (b)(1)-(2), new subsection (b)(3) and amendment of NOTE refiled 10-16-95 as an emergency; operative 10-16-95 (Register 95, No. 42). A Certificate of Compliance must be transmitted to OAL by 2-13-96 or emergency language will be repealed by operation of law on the following day.
6. Certificate of Compliance as to 10-24-94 order including amendment of subsection (b)(2) transmitted to OAL 12-15-95 and filed 1-31-95 (Register 96, No. 5).
7. Change without regulatory effect amending subsection (b)(1) filed 8-15-97 pursuant to section 100, title 1, California Code of Regulations (Register 97, No. 33).
8. Change without regulatory effect amending subsection (c) filed 11-6-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 45).

§66265.141. Definitions As Used in This Article.

(a) The following terms, as defined in section 66260.10, are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.

"Assets"

"Current assets"

"Current liabilities"

"Current plugging and abandonment cost estimate"

"Independently audited"

"Liabilities"

"Net working capital"

"Net worth"

"Substantial business relationship"

"Tangible net worth"

(b) In the liability coverage requirements the terms "bodily injury" and "property damage" as defined in section 66260.10 shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practice, are excluded from coverage in liability policies for bodily injury and property damage. The Department intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below and defined in section 66260.10 are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

"Accidental occurrence"

"Legal defense costs"

"Nonsudden accidental occurrence"
"Sudden accidental occurrence"

NOTE: Authority cited: Sections 208, 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Section 25245, Health and Safety Code; 40 CFR Section 265.141.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).

§66265.142. Cost Estimate for Closure.

(a) The owner or operator shall prepare and submit to the Department a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in sections 66265.111 through 66265.115 and applicable closure requirements in sections 66265.178, 66265.197, 66265.228, 66265.258, 66265.280, 66265.310, 66265.351, 66265.381, 66265.404, and 66265.1102.

(1) The estimate shall be submitted in accordance with sections 66270.10 and 66270.14. The estimate shall equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see section 66265.112(b)).

(2) The closure cost estimate shall be based on the costs to the owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of parent corporation in section 66260.10.) The owner or operator may use costs for on-site disposal if it can be demonstrated that on-site disposal capacity will exist at all times over the life of the facility.

(3) The closure cost estimate shall not incorporate any salvage value that may be realized by the sale of hazardous wastes, or non-hazardous wastes if applicable under section 66265.113(d), facility structures or equipment, land or other facility assets associated with the facility at the time of the partial or final closure.

(4) The owner or operator shall not incorporate a zero cost for hazardous wastes, or non-hazardous wastes if applicable under section 66265.113(d), that might have economic value.

(b) During the active life of the facility, the owner or operator shall adjust the closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with section 66265.143. For owners and operators using the financial test or corporate guarantee, the closure cost estimate shall be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Department as specified in section 66265.143(e)(3). The adjustment shall be made by recalculating the closure cost estimate in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified in subsections (b)(1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted closure cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator shall revise the closure cost estimate no later than 30 days after a revision has been made to the closure plan which increases the cost of closure. If the owner or operator has an approved closure plan, the closure cost estimate shall be revised no later than 30 days after the Department has approved the request to modify the closure plan, if the change in the closure plan increases the cost of closure. The revised closure cost estimate shall be adjusted for inflation as specified in subsection (b) of this section.

(d) The owner or operator shall keep the following at the facility during the operating life of the facility: The latest closure cost estimate prepared in accordance with subsections (a) and (c) of this section and, when this estimate has been adjusted in accordance with subsection (b) of this section, the latest adjusted closure cost estimate.

NOTE: Authority cited: Sections 25150, 25159, 25159.5, 25179.6, 25245, 58004, and 58012, Health and Safety Code. Reference: Sections 25159, 25159.5 and 25245, Health and Safety Code; 40 CFR Section 265.142.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).
2. Amendment of subsection (a) and Note filed 10-24-94 as an emergency; operative 10-24-94 (Register 94, No. 43). A Certificate of Compliance must be transmitted to OAL by 2-20-95 or emergency language will be repealed by operation of law on the following day.
3. Amendment of subsection (a) and Note refiled 2-21-95 as an emergency; operative 2-21-95 (Register 95, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-21-95 or emergency language will be repealed by operation of law on the following day.
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6. Certificate of Compliance as to 10-24-94 order including amendment of subsection (a) transmitted to OAL 12-15-95

and filed 1-31-95 (Register 96, No. 5).
7. Amendment of subsections (a)(3)-(4) and NOTE filed 6-20-96; operative 7-20-96 (Register 96, No. 25).

§66265.143. Financial Assurance for Closure.

An owner or operator of each facility shall establish and demonstrate to the Department financial assurance for closure of the facility. The owner or operator shall choose from the options as specified in subsections (a) through (e) and (h) of this section.

(a) Closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a closure trust fund which conforms to the requirements of this subsection and submitting an originally signed duplicate of the trust agreement to the Department. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement shall be identical to the wording specified in section 66264.151, subsection (a)(1), shall contain original signatures and shall be accompanied by a formal certification of acknowledgement (for example, see section 66264.151, subsection (a)(2)). Schedule A of the trust agreement shall be updated within 60 days after a change in the amount of the current closure cost estimate covered by the trust agreement.

(3) Payments into the trust fund shall be made annually by the owner or operator over the ten (10) years beginning with the establishment of the trust fund or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund shall be made as follows.

(A) The first payment shall be at least equal to the current closure cost estimate, except as provided in subsection (f), of this section divided by the number of years in the pay-in period.

(B) Subsequent payments shall be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

$$\text{Next payment} = \frac{CE - CV}{Y}$$

where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or deposit the full amount of the current closure cost estimate at the time the fund is established. However, the value of the fund shall be maintained at no less than the value that the fund would have if annual payments were made as specified in subsection (a)(3) of this section.

(5) If the owner or operator establishes a closure trust fund after having used one or more alternate mechanisms specified in this section, the first payment shall be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in subsection (a)(3) of this section.

(6) After the pay-in period is completed, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this article to cover the difference.

(7) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the Department for release of the amount in excess of the current closure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, a written request may be submitted to the Department for release of the amount in excess of the current closure cost estimate covered by the trust fund.

(9) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsections (a)(7) or (8) of this section, the Department will instruct the trustee to release to the owner or operator such funds as the Department specifies in writing.

(10) Before final closure occurs, the value of the trust fund shall equal the amount of the current closure cost estimate. If the value of the fund is less than the amount of the current estimate, the owner or operator shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance, as specified in this section, to cover the difference.

(11) After beginning partial or final closure, an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Department. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. No later than 60 days after receiving bills for partial or final closure activities, the Department shall instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Department has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, the Department may withhold reimbursements of such amounts

as deemed prudent until a determination is made, in accordance with subsection (i) of this section, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Department does not instruct the trustee to make such reimbursements, a detailed written statement of reasons will be provided to the owner or operator.

(12) The Department will agree to termination of the trust when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(b) Surety bond guaranteeing payment into a closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this subsection and submitting the bond to the Department. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond shall be identical to the wording specified in section 66264.151, subsection (b). The surety bond shall contain original signatures and shall be accompanied by the documents specified in this subsection.

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section shall also establish a standby trust fund. Under the terms of the bond, all payments made thereunder shall be deposited by the surety directly into the standby trust fund in accordance with instructions from the Department. This standby trust fund shall meet the requirements specified in subsection (a) of this section, except that:

(A) an originally signed duplicate of the standby trust agreement shall be submitted to the Department with the surety bond; and

(B) until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

1. payments into the trust fund as specified in subsection (a) of this section;

2. updating of Schedule A of the trust agreement (see section 66264.151, subsection (a)) to show current closure cost estimates;

3. annual valuations as required by the trust agreement; and

4. notices of nonpayment as required by the trust agreement.

(4) The bond shall guarantee that the owner or operator shall:

(A) fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(B) fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the Department becomes final, or within 15 days after an order to begin final closure is issued by a U.S. district court or other court of competent jurisdiction; or

(C) provide alternate financial assurance as specified in this section, and obtain the Department's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. For facilities that require a RCRA permit, the determination will be made pursuant to Health and Safety Code Section 25187.

(6) The penal sum of the bond shall be in an amount at least equal to the current closure cost estimate, except as provided in subsection (f) of this section.

(7) Whenever the current closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, shall either cause the penal sum to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure cost estimate following written approval by the Department.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation shall not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipt.

(9) The owner or operator may cancel the bond if the Department has given prior written consent based on receipt of evidence of alternate financial assurance as specified in this section.

(c) Closure letter of credit.

(1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this subsection and submitting the letter to the Department. The issuing institution shall be an entity which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit shall be identical to the wording specified in section 66264.151, subsection (d). The letter of credit shall contain original signatures and shall be accompanied by the documents specified in this subsection.

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section shall also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department shall be deposited by the issuing institution directly into the standby trust fund in accordance with

instructions from the Department. This standby trust fund shall meet the requirements of the trust fund specified in subsection (a) of this section, except that:

(A) an originally signed duplicate of the standby trust agreement shall be submitted to the Department with the letter of credit; and

(B) unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

1. payments into the trust fund as specified in subsection (a) of this section;

2. updating of Schedule A of the trust agreement (see section 66264.151, subsection (a)) to show current closure cost estimates;

3. annual valuations as required by the trust agreement; and

4. notices of nonpayment as required by the trust agreement.

(4) The letter of credit shall be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the Hazardous Waste Facility Identification Number, name and address of the facility, and the amount of funds assured for closure of the facility by the letter of credit.

(5) The letter of credit shall be irrevocable and issued for a period of at least one (1) year. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Department by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days shall begin on the date when both the owner or operator and the Department have received the notice, as evidenced by the return receipts.

(6) The letter of credit shall be issued in an amount at least equal to the current closure cost estimate, except as provided in subsection (f) of this section.

(7) Whenever the current closure cost estimate increases to an amount greater than the amount of the letter of credit, the owner or operator, within 60 days after the increase, shall either cause the amount of the letter of credit to be increased so that it at least equals the current closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the amount of the letter of credit may be reduced to the amount of the current closure cost estimate following written approval by the Department.

(8) Following a determination by the Department that the owner or operator has failed to perform final closure in accordance with the approved closure plan when required to do so, the Department may draw on the letter of credit. For facilities that require a RCRA permit, that determination shall be made pursuant to Section 25187 of the Health and Safety Code.

(9) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Department shall draw on the letter of credit. The Department shall delay drawing on the letter of credit in accordance with the provisions of this paragraph if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Department shall draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Department.

(10) The Department shall return the letter of credit to the issuing institution for termination when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(d) Closure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining closure insurance which conforms to the requirements of this section and submitting a certificate of such insurance to the Department. The owner or operator shall submit to the Department a letter from an insurer stating that the insurer is considering issuance of closure insurance conforming to the requirements of this subsection to the owner or operator. The owner or operator shall submit the certificate of insurance to the Department or establish other financial assurance as specified in this section. At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) The wording of the certificate of insurance shall be identical to the wording specified in section 66264.151, subsection (e). The certificate of insurance shall contain original signatures.

(3) The closure insurance policy shall be issued for a face amount at least equal to the current closure cost estimate, except as provided in subsection (f) of this section. The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(4) The closure insurance policy shall guarantee that funds shall be available to close the facility whenever final closure occurs. The policy shall also guarantee that once final closure begins, the insurer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon direction from the Department, to such party or parties as the Department specifies.

(5) After beginning partial or final closure, an owner or operator or any other person authorized to conduct closure may request reimbursements for closure expenditures by submitting itemized bills to the Department. The owner or operator may request reimbursements for partial closure only if the remaining value of the policy is sufficient

to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure activities, the Department shall instruct the insurer to make reimbursements in such amounts as the Department specifies in writing if the Department determines that the partial or final closure expenditures are in accordance with the approved closure plan or otherwise justified. If the Department has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, a reimbursement of such amounts may be withheld as deemed prudent until a determination, in accordance with subsection (i) of this section, that the owner or operator is no longer required to maintain financial assurance for final closure of the particular facility is made. If the Department does not instruct the insurer to make such reimbursements, the owner or operator shall be provided a detailed written statement of reasons.

(6) The owner or operator shall maintain the policy in full force and effect until the Department consents to termination of the policy by the owner or operator as specified in subsection (d)(10) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in this section, shall constitute a significant violation of these regulations, warranting such remedy as the Department deems necessary. Such violation will be deemed to begin upon receipt by the Department of a notice of future cancellation, termination or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy shall contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy shall provide that the insurer may not cancel, terminate or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate or fail to renew the policy by sending notice by certified mail to the owner or operator and the Department. Cancellation, termination or failure to renew shall not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Department and the owner or operator, as evidenced by the return receipts. Cancellation, termination or failure to renew shall not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(A) the Department deems the facility abandoned; or

(B) interim status is terminated or revoked; or

(C) closure is ordered by the Department or any other State or Federal agency or a U.S. district court or other court of competent jurisdiction; or

(D) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(E) the premium due is paid.

(9) Whenever the current closure cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within 60 days after the increase, shall either cause the face amount to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the face amount may be reduced to the amount of the current closure cost estimate following written approval by the Department.

(10) The Department shall give written consent to the owner or operator that the insurance policy may be terminated when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(e) Financial test and guarantee for closure.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he or she passes a financial test as specified in this subsection. To pass this test the owner or operator shall meet the criteria of either subsection (e)(1)(A) or (B) of this section:

(A) the owner or operator shall have:

1. two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

2. net working capital and tangible net worth each at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates; and

3. tangible net worth of at least $10 million; and

4. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates.

(B) The owner or operator shall have:

1. a current rating for his or her most recent bond issuance of AAA, AA, A or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and

2. tangible net worth at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates; and

3. tangible net worth of at least $10 million; and

4. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost

estimates.

(2) The phrase "current closure and postclosure cost estimates" as used in subsection (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer. The phrase "current plugging and abandonment cost estimates" as used in subsection (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer.

(3) To demonstrate that this test has been met, the owner or operator shall submit the following items to the Department:

(A) a letter signed by the owner's or operator's chief financial officer. The letter shall be on the owner's or operator's official letterhead stationery, shall contain an original signature and shall be worded as specified in section 66264.151, subsection (f); and

(B) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(C) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

1. the independent certified public accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

2. in connection with that procedure, no matters came to the independent certified public accountant's attention which caused the accountant to believe that the specified data should be adjusted.

(4) After the initial submission of items specified in subsection (e)(3) of this section, the owner or operator shall send updated information to the Department within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (e)(3) of this section.

(5) If the owner or operator no longer meets the requirements of subsection (e)(1) of this section, the owner or operator shall send notice to the Department of intent to establish alternate financial assurance as specified in this section. The notice shall be sent by certified mail within 90 days after any occurrence that prevents the owner or operator from meeting the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after such occurrence.

(6) The Department may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (e)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (e)(3) of this section. If the Department finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (e)(1) of this section, the owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(7) The Department may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his or her report on examination of the owner's or operator's financial statements (see subsection (e)(3)(B) of this section). An adverse opinion or a disclaimer of opinion shall be cause for disallowance. The Department shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(8) The owner or operator is no longer required to submit the items specified in subsection (e)(3) of this section when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements of this section in accordance with subsection (i) of this section.

(9) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor shall be the direct or higher-tier parent corporation of the owner or operator as defined in section 66260.10, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor shall meet and comply with the requirements for owners or operators in subsections (e)(1) through (e)(8) of this section and shall comply with the terms of the guarantee. The wording of the guarantee shall be identical to the wording specified in section 66264.151, subsection (h). The guarantee shall be on the official letterhead stationery of the parent corporation, shall contain an original signature and the signature shall be formally witnessed or notarized. A certified copy of the guarantee shall accompany the items sent to the Department as specified in subsection (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee shall provide that:

(A) if the owner or operator fails to perform final closure of a facility covered by the guarantee in accordance with the closure plan and other interim status requirements whenever required to do so, the guarantor shall do so or shall establish a trust fund as specified in subsection (a) of this section in the name of the owner or operator;

(B) the guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation shall not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipt;

(C) if the owner or operator fails to provide alternate financial assurance as specified in this section and

obtain the written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the guarantee from the guarantor, the guarantor shall provide such alternate financial assurance in the name of the owner or operator.

(f) Use of multiple financial mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. The mechanisms shall be as specified in subsections (a) through (d) and (h) of this section, except that it is the combination of mechanisms, rather than the single mechanism, which shall provide financial assurance for an amount at least equal to the current closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, the trust fund may be used as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify the other as "excess" coverage. The Department may use any or all of the mechanisms to provide for closure of the facility.

(g) Use of a financial mechanism for multiple facilities. An owner or operator may use one or more of the financial assurance mechanisms specified in section 66265.143, subsections (a) through (e) and (h) to meet the requirements of section 66265.143 for more than one facility. Evidence of financial assurance submitted to the Department shall include a list showing, for each facility, the Hazardous Waste Facility Identification Number, name, address and the amount of funds for closure assured by the mechanism. The amount of funds available through the mechanism shall be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure of any of the facilities covered by the mechanism, the Department may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Alternative Financial Mechanism for Closure Costs.

(1) An owner or operator of a facility or facilities where solely non-RCRA hazardous waste is managed may establish financial assurance for closure by means of a financial mechanism other than those specified in subsections (a) through (e) of this section, provided that, prior to its use, the mechanism has been submitted to and approved by the Department. The mechanism shall be at least equivalent to the financial mechanisms specified in subsections (a) through (e) of this section. The Department shall evaluate the equivalency of a mechanism principally in terms of:

(A) Certainty of the availability of funds for the required closure activities; and

(B) The amount of funds that will be made available.

The Department shall also consider other factors deemed to be appropriate, and shall require the owner or operator to submit additional information as is deemed necessary to make the determination.

(2) The owner or operator shall submit to the Department the proposed mechanism together with a letter requesting that the proposed mechanism be considered acceptable for meeting the requirements of section 66265.143. The submission shall include the following information:

(A) Name, address and telephone number of issuing institution; and

(B) Hazardous waste facility identification number, name, address and closure cost estimate for each facility intended to be covered by the proposed mechanism; and

(C) The amount of funds for closure to be assured for each facility by the proposed mechanism; and

(D) The terms of the proposed mechanism (period covered, renewal/extension, cancellation).

(3) The Department shall notify the owner or operator in writing of the determination made regarding the proposed mechanism's acceptability in lieu of the financial mechanisms specified in subsections (a) through (e) of this section.

(4) If a proposed mechanism is found acceptable, the owner or operator shall submit a fully executed document to the Department. The document shall contain original signatures and shall be accompanied by a formal certification of acknowledgment.

(5) If a proposed mechanism is found acceptable except for the amount of funds, the owner or operator shall either increase the amount of the mechanism or obtain other financial assurance as specified in subsections (a) through (e) of this section. The amount of funds available through the combination of mechanisms shall at least equal the current closure cost estimate.

(i) Release of the owner or operator from the requirements of this section.

(1) Within 60 days after receiving certifications from the owner or operator and an independent professional engineer, registered in California that final closure has been completed in accordance with the approved closure plan, the Department shall notify the owner or operator in writing that he or she is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Department has reason to believe that final closure has not been in accordance with the approved closure plan. The Department shall provide the owner or operator a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.

(2) When transfer of ownership or operational control of a facility occurs, and the new owner or operator has demonstrated to the satisfaction of the Department that he or she is complying with the financial requirements of this section, the Department shall notify the previous owner or operator in writing that they are no longer required to maintain financial assurance for closure of that particular facility.

NOTE: Authority cited: Sections 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Sections 25245 and 25245.4, Health and Safety Code; 40 CFR Section 264.143.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).
2. Amendment of subsections (f)(1) and (f)(2) filed 10-23-91; operative 1-1-92 (Register 92, No. 12).
3. Editorial correction redesignating subsection (f)(9) to subsection (g) and amending subsection (i)(1) (Register 92, No. 29).
4. Change without regulatory effect amending subsections (a)(2), (b)(2), (b)(3)(A), (c)(2), (c)(3)(A), (d)(2), (e), (e)(3)(A), and (e)(9)-(e)(9)(C) filed 8-17-95 pursuant to section 100, title 1, California Code of Regulations (Register 95, No. 33).
5. Amendment of subsections (f)(1), (f)(2) and (f)(2)(B)-(C) filed 2-13-96 as an emergency; operative 2-13-96 (Register 96, No. 7). A Certificate of Compliance must be transmitted to OAL by 6-12-96 or emergency language will be repealed by operation of law on the following day.
6. Reinstatement of subsections (f)(1), (f)(2) and (f)(2)(B)-(C) as they existed prior to emergency amendment filed 2-13-96 by operation of Government Code section 11346.1(f) (Register 96, No. 25).
7. Amendment of subsections (f)(1), (f)(2) and (f)(2)(B)-(C) filed 6-17-96 as an emergency; operative 6-17-96 (Register 96, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-15-96 or emergency language will be repealed by operation of law on the following day.
8. Amendment of subsections (f)(1), (f)(2) and (f)(2)(B)-(C) refiled 10-15-96 as an emergency; operative 10-15-96 (Register 96, No. 42). A Certificate of Compliance must be transmitted to OAL by 2-13-97 or emergency language will be repealed by operation of law on the following day.
9. Reinstatement of section as it existed prior to 10-15-96 emergency amendment by operation of Government Code section 11346.1(f) (Register 97, No. 9).
10. Editorial correction of History 8 (Register 97, No. 9).
11. Amendment of subsections (f)(1), (f)(2) and (f)(2)(B)-(C) filed 2-24-97 as an emergency; operative 2-24-97 (Register 97, No. 9). A Certificate of Compliance must be transmitted to OAL by 6-24-97 or emergency language will be repealed by operation of law on the following day.
12. Certificate of Compliance as to 2-24-97 order, including amendments to subsection (f)(1)(B) and NOTE, transmitted to OAL 6-24-97 and filed 8-6-97 (Register 97, No. 32).
13. Change without regulatory effect amending subsections (a)(1)-(2), (b)(2), (b)(3)(A), (b)(5), (c)(1)-(2), (c)(3)(A), (c)(8), (d)(2), (d)(8)(C), (e)(3)(A) and (e)(9) filed 11-6-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 45).
14. Change without regulatory effect amending subsection (d)(2) filed 10—22—2003 pursuant to section 100, title 1, California Code of Regulations (Register 2003, No. 43).
15. Change without regulatory effect amending section and Note filed 12-19-2005 pursuant to section 100, title 1, California Code of Regulations (Register 2005, No. 51).

§66265.144. Cost Estimate for Post-Closure Care.

(a) The owner or operator of a hazardous waste disposal unit shall prepare and submit to the Department a detailed written estimate, in current dollars, of the annual cost of postclosure monitoring and maintenance of the facility in accordance with the applicable postclosure regulations in sections 66265.117 through 66265.120, 66265.228, 66265.258, 66265.280 and 66265.310.

(1) The postclosure cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct postclosure care activities. A third party is a party who is neither a parent nor subsidiary of the owner or operator. (See definition of parent corporation in section 66260.10).

(2) The postclosure cost estimate is calculated by multiplying the annual postclosure cost estimate by the number of years of postclosure care required under section 66265.117.

(b) During the active life of the facility, the owner or operator shall adjust the postclosure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with section 66265.145. For owners or operators using the financial test or corporate guarantee, the postclosure care cost estimate shall be updated for inflation no later than 30 days after the close of the firm's fiscal year and before submission of updated information to the Department as specified in section 66265.145(d)(5). The adjustment shall be made by recalculating the postclosure cost estimate in current dollars or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business as specified in subsections (b)(1) and (b)(2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the postclosure cost estimate by the inflation factor. The result is the adjusted postclosure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted postclosure cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator shall revise the postclosure cost estimate no later than 30 days after a revision to the postclosure plan which increases the cost of postclosure care. If the owner or operator has an approved postclosure plan, the postclosure cost estimate shall be revised no later than 30 days after the Department has approved the request to modify the plan, if the change in the postclosure plan increases the cost of postclosure care. The revised postclosure cost estimate shall be adjusted for inflation as specified in subsection (b) of this section.

(d) The owner or operator shall keep the following at the facility during the operating life of the facility: the latest postclosure cost estimate prepared in accordance with subsections (a) and (c) of this section and, when this estimate has been adjusted in accordance with subsection (b) of this section, the latest adjusted postclosure cost

estimate.

NOTE: Authority cited: Sections 208, 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Section 25245, Health and Safety Code; 40 CFR Section 265.144.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).

§66265.145. Financial Assurance for Postclosure Care.

An owner or operator of a facility with a hazardous waste disposal unit shall establish and demonstrate to the Department financial assurance for postclosure care of the disposal unit(s). The owner or operator shall choose from the options as specified in subsections (a) through (e) and (h) of this section.

(a) Postclosure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a postclosure trust fund which conforms to the requirements of this subsection and submitting an originally signed duplicate of the trust agreement to the Department. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement shall be identical to the wording specified in section 66264.151, subsection (a)(1). The trust agreement shall contain original signatures and shall be accompanied by a formal certification of acknowledgment (for example, see section 66264.151, subsection (a)(2)). Schedule A of the trust agreement shall be updated within 60 days after a change in the amount of the current postclosure cost estimate covered by the agreement.

(3) Payments into the trust fund shall be made annually by the owner or operator over the ten (10) years beginning with the establishment of the trust fund or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the postclosure trust fund shall be made as follows:

(A) The first payment shall be at least equal to the current postclosure cost estimate, except as provided in subsection (f) of this section, divided by the number of years in the pay-in period.

(B) Subsequent payments shall be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment shall be determined by this formula:

$$\text{Net payment} = \frac{CE - CV}{Y}$$

where CE is the current postclosure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or deposit the full amount of the current postclosure cost estimate at the time the fund is established. However, the value of the fund shall be maintained at no less than the value that the fund would have if annual payments were made as specified in subsection (a)(3) of this section.

(5) If the owner or operator establishes a postclosure trust fund after having used one or more alternate mechanisms specified in this section, the first payment shall be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in subsection (a)(3) of this section.

(6) After the pay-in period is completed, whenever the current postclosure cost estimate changes during the operating life of the facility, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current postclosure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) During the operating life of the facility, if the value of the trust fund is greater than the total amount of the current postclosure cost estimate, the owner or operator may submit a written request to the Department for release of the amount in excess of the current postclosure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, the owner or operator may submit a written request to the Department for release of the amount in excess of the current postclosure cost estimate covered by the trust fund.

(9) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (a)(7) or (8) of this section, the Department will instruct the trustee to release to the owner or operator such funds as the Department specifies in writing.

(10) Before final postclosure occurs, the value of the trust fund shall equal the amount of the current postclosure cost estimate. If the value of the fund is less than the amount of the current estimate, the owner or operator shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current postclosure cost estimate, or obtain other financial assurance, as specified in this section, to cover the difference.

(11) During the period of postclosure care, the Department shall approve a release of funds if the owner or operator demonstrates to the satisfaction of the Department that the value of the trust fund exceeds the remaining cost of postclosure care.

(12) An owner or operator or any other person authorized to conduct postclosure care may request

reimbursements for postclosure expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for postclosure care activities, the Department will instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines that the postclosure expenditures are in accordance with the approved postclosure plan or otherwise justified. If the Department does not instruct the trustee to make such reimbursements, the owner or operator shall be provided a detailed written statement of reasons.

(13) The Department will agree to termination of the trust when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(b) Surety bond guaranteeing payment into a postclosure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this subsection and submitting the bond to the Department. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond shall be identical to the wording specified in section 66264.151, subsection (b). The surety bond shall contain original signatures and shall be accompanied by the documents specified in this subsection.

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section shall also establish a standby trust fund. Under the terms of the bond, all payments made thereunder shall be deposited by the surety directly into the standby trust fund in accordance with instructions from the Department. This standby trust fund must meet the requirements specified in subsection (a) of this section, except that:

(A) an originally signed duplicate of the standby trust agreement shall be submitted to the Department with the surety bond; and

(B) until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

1. payments into the trust fund as specified in subsection (a) of this section;

2. updating of Schedule A of the trust agreement (see section 66264.151, subsection (a)) to show current postclosure cost estimates;

3. annual valuations as required by the trust agreement; and

4. notices of nonpayment as required by the trust agreement.

(4) The bond shall guarantee that the owner or operator shall:

(A) fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(B) fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the Department becomes final, or within 15 days after an order to begin final closure is issued by a U.S. district court or other court of competent jurisdiction; or

(C) provide alternate financial assurance as specified in this section, and obtain the Department's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond shall be in an amount at least equal to the current postclosure cost estimate, except as provided in subsection (f) of this section.

(7) Whenever the current postclosure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, shall either cause the penal sum to be increased to an amount at least equal to the current postclosure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current postclosure cost estimate decreases, the penal sum may be reduced to the amount of the current postclosure cost estimate following written approval by the Department.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation shall not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the Department has given prior written consent based on receipt of evidence of alternate financial assurance as specified in this section.

(c) Postclosure letter of credit.

(1) An owner or operator may satisfy the requirements of this section by obtaining and submitting to the Department, an irrevocable standby letter of credit which conforms to the requirements of this subsection. The issuing institution shall be an entity which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit shall be identical to the wording specified in section 66264.151, subsection (d). The letter of credit shall contain original signatures and shall be accompanied by the documents specified in this subsection.

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section shall also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department shall be deposited by the issuing institution directly into the standby trust fund in accordance with

instructions from the Department. This standby trust fund must meet the requirements of the trust fund specified in subsection (a) of this section, except that:

(A) an originally signed duplicate of the standby trust agreement shall be submitted to the Department with the letter of credit; and

(B) unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

1. payments into the trust fund as specified in subsection (a) of this section;

2. updating of Schedule A of the trust agreement (see section 66264.151, subsection (a)) to show current postclosure cost estimates;

3. annual valuations as required by the trust agreement; and

4. notices of nonpayment as required by the trust agreement.

(4) The letter of credit shall be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution and date, and providing the following information: the Hazardous Waste Facility Identification Number, name and address of the facility and the amount of funds assured for postclosure care of the facility by the letter of credit.

(5) The letter of credit shall be irrevocable and issued for a period of at least one (1) year. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one (1) year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Department by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days shall begin on the date when both the owner or operator and the Department have received the notice, as evidenced by the return receipts.

(6) The letter of credit shall be issued in an amount at least equal to the current postclosure cost estimate, except as provided in subsection (f) of this section.

(7) Whenever the current postclosure cost estimate increases to an amount greater than the amount of the letter of credit during the operating life of the facility, the owner or operator, within 60 days after the increase, shall either cause the amount of the letter of credit to be increased so that it at least equals the current postclosure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current postclosure cost estimate decreases during the operating life of the facility, the amount of the letter of credit may be reduced to the amount of the current postclosure cost estimate following written approval from the Department.

(8) During the period of postclosure care, the Department may approve a decrease in the amount of the letter of credit if the owner or operator demonstrates to the Department that the amount exceeds the remaining cost of postclosure care.

(9) Following a determination by the Department that the owner or operator has failed to perform postclosure care in accordance with the approved postclosure plan and other permit requirements, the Department may draw on the letter of credit.

(10) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Department shall draw on the letter of credit. The Department shall delay drawing on the letter of credit in accordance with the provisions of this paragraph, if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Department shall draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Department.

(11) The Department shall return the letter of credit to the issuing institution for termination when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) The Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(d) Postclosure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining postclosure insurance which conforms to the requirements of this subsection and submitting a certificate of such insurance to the Department. The owner or operator shall submit to the Department a letter from an insurer stating that the insurer is considering issuance of postclosure insurance conforming to the requirements of this section to the owner or operator. The owner or operator shall submit the certificate of insurance to the Department or establish other financial assurance as specified in this section. At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) The wording of the certificate of insurance shall be identical to the wording specified in section 66264.1151, subsection (e). The certificate of insurance shall contain original signatures.

(3) The postclosure insurance policy shall be issued for a face amount at least equal to the current postclosure cost estimate, except as provided in subsection (f) of this section. The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(4) The postclosure insurance policy shall guarantee that funds shall be available to provide postclosure care of the facility whenever the postclosure period begins. The policy shall also guarantee that once postclosure care begins the insurer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Department, to such party or parties as the Department specifies.

(5) An owner or operator or any other person authorized to perform postclosure care may request reimbursement for postclosure care expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for postclosure care activities, the Department will instruct the insurer to make reimbursements in those amounts as the Department specifies in writing, if the Department determines that the postclosure expenditures are in accordance with the approved postclosure plan or otherwise justified. If the Department does not instruct the insurer to make such reimbursements, a detailed written statement of reasons will be provided to the owner or operator.

(6) The owner or operator shall maintain the policy in full force and effect until the Department consents to termination of the policy by the owner or operator as specified in subsection (d)(11) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in the section, shall constitute a significant violation of these regulations, warranting such remedy as the Department deems necessary. Such violation shall be deemed to begin upon receipt by the Department of a notice of future cancellation, termination or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy shall contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy shall provide that the insurer may not cancel, terminate or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate or fail to renew the policy by sending notice by certified mail to the owner or operator and the Department. Cancellation, termination or failure to renew shall not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Department and the owner or operator, as evidenced by the return receipts. Cancellation, termination or failure to renew shall not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(A) the Department deems the facility abandoned; or

(B) interim status is terminated or revoked; or

(C) closure is ordered by the Department or any other State or Federal agency or a U.S. District Court or other court of competent jurisdiction; or

(D) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(E) the premium due is paid.

(9) Whenever the current postclosure cost estimate increases to an amount greater than the face amount of the policy during the operating life of the facility, the owner or operator, within 60 days after the increase, shall either cause the face amount to be increased to an amount at least equal to the current postclosure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current postclosure cost estimate decreases during the operating life of the facility, the face amount may be reduced to the amount of the current postclosure cost estimate following written approval by the Department.

(10) Commencing on the date that liability to make payments pursuant to the policy accrues, the insurer shall thereafter annually increase the face amount of the policy. Such increase shall be equivalent to the face amounts of the policy, less any payments made, multiplied by an amount equivalent to 85 percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. Treasury for 26-week Treasury securities.

(11) The Department will give written consent to the owner or operator that the insurance policy may be terminated when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements of this section in accordance with subsection (i) of this section.

(e) Financial test and guarantee for postclosure care.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he or she passes a financial test as specified in this section. To pass this test the owner or operator shall meet the criteria either of subsection (e)(1)(A) or (B) of this section.

(A) the owner or operator shall have:

1. two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

2. net working capital and tangible net worth each at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates; and

3. tangible net worth of at least $10 million; and

4. assets in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates.

(B) the owner or operator shall have:

1. a current rating for his or her most recent bond issuance of AAA, AA, A or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and

2. tangible net worth at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates; and

3. tangible net worth of at least $10 million; and

4. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates.

(2) The phrase "current closure and postclosure cost estimates" as used in subsection (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1 through 4 of the letter from the owner's or operator's chief financial officer. The phrase "current plugging and abandonment cost estimates" as used in subsection (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1 through 4 of the letter from the owner's or operator's chief financial officer.

(3) To demonstrate that this test can be met, the owner or operator shall submit the following items to the Department:

(A) a letter signed by the owner's or operator's chief financial officer and worded as specified in section 66264.151, subsection (f). The letter shall be on the owner's or operator's official letterhead stationery, and shall contain an original signature, and

(B) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(C) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

1. the independent certified public accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

2. in connection with that procedure, no matters came to the independent certified public accountant's attention which caused him or her to believe that the specified data should be adjusted.

(4) After the initial submission of items specified in subsection (e)(3) of this section, the owner or operator shall send updated information to the Department within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (e)(3) of this section.

(5) If the owner or operator no longer meets the requirements of subsection (e)(1) of this section, the owner or operator must send notice to the Department of intent to establish alternate financial assurance as specified in this section. The notice shall be sent by certified mail within 90 days after any occurrence that prevents the owner or operator from meeting the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after any such occurrence.

(6) The Department may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (e)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (e)(3) of this section. If the Department finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (e)(1) of this section, the owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(7) The Department may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his or her report on examination of the owner's or operator's financial statements (see subsection (e)(3)(B) of this section). An adverse opinion or a disclaimer of opinion shall be cause for disallowance. The Department will evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(8) During the period of postclosure care, the Department may approve a decrease in the current postclosure cost estimate for which this test demonstrates financial assurance if the owner or operator demonstrates to the Department that the amount of the cost estimate exceeds the remaining cost of postclosure care.

(9) The owner or operator is no longer required to submit the items specified in subsection (e)(3) of this section when:

(A) an owner or operator substitutes alternate financial assurance as specified in this section; or

(B) the Department releases the owner or operator from the requirements in accordance with subsection (i) of this section.

(10) An owner or operator may meet the requirements for this section by obtaining a written guarantee. The guarantor shall be the direct or higher-tier parent corporation as defined in section 66260.10 of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor shall meet the requirements for owners or operators in subsections (e)(1) through (9) of this section and shall comply with the terms of the guarantee. The wording of the guarantee shall be identical to the wording specified in section 66264.151, subsection (h). A certified copy of the guarantee shall accompany the items sent to the Department as specified in subsections (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee shall provide that:

(A) if the owner or operator fails to perform postclosure care of a facility covered by the guarantee in accordance with the postclosure plan and other interim status requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in subsection (a) of this section in the name of the owner or operator;

(B) the guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to

the owner or operator and to the Department. Cancellation shall not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department as evidenced by the return receipts;

(C) if the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the guarantee from the guarantor, the guarantor shall provide such alternate financial assurance in the name of the owner or operator.

(f) Use of multiple financial mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. The mechanisms shall be as specified in subsections (a) through (d) and (h) of this section, except that it is the combination of mechanisms, rather than the single mechanism, which shall provide financial assurance for an amount at least equal to the current postclosure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he or she may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify the other as "excess" coverage. The Department may use any or all of the mechanisms to provide for postclosure care of the facility.

(g) Use of a financial mechanism for multiple facilities for postclosure care. An owner or operator may use one or more of the financial assurance mechanisms specified in subsections (a) through (e) and (h) of this section and section 66265.146 to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Department shall include a list showing, for each facility, the Hazardous Waste Facility Identification Number, name, address and the amount of funds for postclosure care assured by the mechanism. The amount of funds available through the mechanism shall be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for postclosure care of any of the facilities covered by the mechanism, the Department may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Alternative Financial Mechanism for Postclosure Care.

(1) The owner or operator may establish financial assurance for postclosure care for facilities which manage solely non-RCRA hazardous waste by means of a financial mechanism other than as specified in subsections (a) through (e) of this section, provided that prior to its use the mechanism has been submitted to and approved by the Department. The mechanism shall be at least equivalent to the financial mechanisms specified in subsections (a) through (e) of this section and section 66265.146. The Department shall evaluate the equivalency of a mechanism principally in terms of:

(A) certainty of the availability of funds for the required postclosure care activities; and

(B) the amount of funds that will be made available;

(C) the Department may also consider other factors deemed to be appropriate, and may require the owner or operator to submit additional information as is deemed necessary to make the determination.

(2) The owner or operator shall submit to the Department the proposed mechanism together with a letter requesting that the proposed mechanism be considered acceptable for meeting the requirements of this section. The submission shall include the following information:

(A) name, address and phone number of the issuing institution; and

(B) hazardous waste facility identification number, name, address and postclosure cost estimate for each facility; and

(C) the amount of funds for postclosure care to be assured for each facility by the proposed mechanism; and

(D) the terms of the proposed mechanism (period covered, renewal/extension, cancellation).

(3) The Department shall notify the owner or operator in writing of the determination made regarding the proposed mechanism's acceptability in lieu of the financial assurance mechanisms specified in subsections (a) through (e) of this section.

(4) If a proposed mechanism is found acceptable, the owner or operator shall submit a fully executed document to the Department. The document shall contain original signatures and shall be accompanied by a formal certification of acknowledgment.

(5) If a proposed mechanism is found acceptable except for the amount of funds, the owner or operator shall either increase the amount of the mechanism or obtain other financial assurance as specified in subsections (a) through (e) of this section. The amount of funds available through the combination of mechanisms shall at least equal the current postclosure cost estimate.

(i) Release of the owner or operator from Financial Assurance requirements for postclosure care.

(1) Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that all postclosure care requirements have been completed in accordance with the approved postclosure plan, the Department, at the request of the owner or operator, will notify the owner or operator in writing that he or she is no longer required by this section to maintain financial assurance for postclosure care of that unit, unless the Department has reason to believe that postclosure care has not been in accordance with the approved postclosure plan. The Department shall provide the owner or operator a detailed written statement of any such reason to believe that postclosure care has not been in accordance with the approved postclosure plan.

(2) When transfer of ownership or operational control of a facility occurs, and the new owner or operator has demonstrated to the satisfaction of the Department that the owner or operator is complying with the financial

requirements of this section, the Department shall notify the previous owner or operator in writing that they are no longer required to maintain financial assurance for postclosure care of that particular facility.

NOTE: Authority cited: Sections 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Section 25245, Health and Safety Code; 40 CFR Section 265.145.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).
2. Change without regulatory effect amending subsections (a)(2), (b)(2), (b)(3)(A), (c)(2), (c)(3)(A), (d)(2), (e), (e)(3)(A), and (e)(10)-(e)(10)(C) and renumbering subsections filed 8-17-95 pursuant to section 100, title 1, California Code of Regulations (Register 95, No. 33).
3. Editorial correction of subsection numbering (Register 95, No. 35).
4. Change without regulatory effect amending subsections (a)(1)-(3), (b)(2), (b)(3)(A), (c)(1)(-(2), (c)(3)(A), (d)(2), (d)(8)(C), (e)(3)(A), (e)(5) and (e)(10) filed 11-6-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 45).
5. Change without regulatory effect amending subsection (d)(2) filed 10—22—2003 pursuant to section 100, title 1, California Code of Regulations (Register 2003, No. 43).
6. Change without regulatory effect amending section and Note filed 12-19-2005 pursuant to section 100, title 1, California Code of Regulations (Register 2005, No. 51).

§66265.146. Use of a Mechanism for Financial Assurance of Both Closure and Post-Closure Care.

An owner or operator may satisfy the requirements for financial assurance for both closure and post-closure care for one or more facilities by using a trust fund, surety bond, letter of credit, insurance, financial test, or corporate guarantee or alternative mechanism, that meets the specifications for the mechanism in both sections 66265.143 and 66265.145. The amount of funds available through the mechanism shall be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for financial assurance of closure and of post-closure care.

NOTE: Authority cited: Sections 208, 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Section 25245, Health and Safety Code; 40 CFR Section 265.146.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).

§ 66265.147. Liability Requirements.

(a) Coverage for sudden accidental occurrences. An owner or operator of a hazardous waste transfer, treatment, storage or disposal facility or a group of such facilities, shall demonstrate to the Department financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. Except as specified in Section 67450.16, the owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated, as specified in subsections (a)(1), (2), (3), (4), (5), (6) or (8) of this section, and for an operator which is a public agency proposing to operate a household hazardous waste collection facility, subsection (7).

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this subsection.

(A) At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(B) Each insurance policy shall be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. If requested by the Department, the owner or operator shall provide a copy of the insurance policy; the copy of the insurance policy shall contain original signatures.

(C) The wording of the liability endorsement shall be identical to the wording specified in section 66264.151, subsection (i). The liability endorsement shall contain original signatures and shall be submitted to the Department.

(D) The wording of the certificate of insurance shall be identical to the wording specified in section 66264.151, subsection (j). The certificate of insurance shall contain original signatures and shall be submitted to the Department.

(E) An owner or operator of a new facility shall submit the liability endorsement or certificate of insurance to the Department at least 60 days before the date on which hazardous waste is first received for transfer, treatment, storage or disposal. The insurance shall be effective before this initial receipt of hazardous waste.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in subsections (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in subsection (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a payment bond for liability coverage as specified in subsection (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in subsection (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through use of combinations of

insurance, financial test, guarantee, letter of credit, payment bond and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated shall total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify the other assurance as "excess" coverage.

(7) An operator which is a public agency which is proposing to operate a household hazardous waste collection facility may meet the requirements of this section by obtaining self-insurance as specified in subsection (k) of this section.

(8) An owner or operator may meet the requirements of this section by obtaining an alternative financial mechanism, as described in subsection (*l*) of this section.

(9) An owner or operator shall notify the Department in writing within 30 days whenever:

(A) a claim results in a reduction in the amount of financial assurance for liability coverage under this section provided by a financial instrument authorized by subsections (a)(1) through (a)(5), (a)(7) and (a)(8) of this section; or

(B) a Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste transfer, treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under subsections (a)(1) through (a)(5), (a)(7) and (a)(8) of this section; or

(C) a final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under subsection (a)(1) through (a)(5), (a)(7) and (a)(8) of this section

(b) Coverage for nonsudden accidental occurrences. An owner or operator of a surface impoundment as defined in section 66260.10, landfill as defined in section 66260.10, or land treatment facility as defined in section 66260.10 which is used to manage hazardous waste, or a group of such facilities, shall demonstrate to the Department financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence, as defined in section 66260.10 with an annual aggregate of at least $6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences shall maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate. This liability coverage may be demonstrated as specified in subsections (b)(1) through (7) of this section.

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this subsection.

(A) At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(B) Each insurance policy shall be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. If requested by the Department, the owner or operator shall provide a copy of the insurance policy; the copy of the insurance policy shall contain original signatures.

(C) The wording of the liability endorsement shall be identical to the wording specified in section 66264.151, subsection (i). The liability endorsement shall contain original signatures and shall be submitted to the Department.

(D) The wording of the certificate of insurance shall be identical to the wording specified in section 66264.151, subsection (j). The certificate of insurance shall contain original signatures and shall be submitted to the Department.

(E) An owner or operator of a new facility shall submit the liability endorsement or certificate of insurance to the Department at least 60 days before the date on which hazardous waste is first received for transfer, treatment, storage or disposal. The insurance shall be effective before this initial receipt of hazardous waste.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in sections (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in subsection (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a payment bond for liability coverage as specified in subsection (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in subsection (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through use of combinations of insurance, financial test, guarantee, letter of credit, payment bond and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirements with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated shall total at least the minimum amounts required by this section. If the owner or

operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as “primary” coverage and shall specify the other assurance as “excess” coverage.

(7) An owner or operator may meet the requirements of this section by obtaining an alternative financial mechanism, as described in subsection (*l*) of this section.

(8) An owner or operator shall notify the Department in writing within 30 days whenever:

(A) a claim results in a reduction in the amount of financial assurance for liability coverage under this section provided by a financial instrument authorized by subsections (b)(1) through (b)(7) of this section; or

(B) a Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste transfer, treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under subsections (b)(1) through (b)(7) of this section; or

(C) a final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under subsections (b)(1) through (b)(7) of this section

(c) Request for variance. If an owner or operator can demonstrate to the satisfaction of the Department that the levels of financial responsibility required by subsection (a) or (b) of this section or section 67450.5 are not consistent with the degree and duration of risk associated with transfer, treatment, storage, or disposal at the facility or group of facilities, the owner or operator may obtain a variance from the Department. The request for a variance shall be submitted in writing to the Department. If granted, the variance shall take the form of an adjusted level of required liability coverage, such level to be based on the Department's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The Department may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the Department to determine a level of financial responsibility other than that required by subsection (a) or (b) of this section or section 67450.5. The Department will process a variance request as if it were a permit modification request under section 66270.41, subsection (a)(5) of this division and subject to the procedures of section 66271.4 of this division. Notwithstanding any other provision, the Department may hold a public hearing at its discretion or whenever it finds, on the basis of requests for a public hearing, a significant degree of public interest is expressed in a tentative decision to grant a variance.

(d) Adjustments by the Department. If the Department determines that the levels of financial responsibility required by subsections (a) or (b) of this section or section 67450.5 are not consistent with the degree and duration of risk associated with transfer, treatment, storage or disposal at the facility or group of facilities, the Department may adjust the level of financial responsibility required under subsections (a) or (b) of this section or section 67450.5 as may be necessary to protect human health and the environment. This adjusted level shall be based on the Department's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the Department determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill or land treatment facility, the Department shall require that an owner or operator of the facility comply with subsection (b) of this section. An owner or operator shall furnish to the Department, within a reasonable time, any information which the Department requests to determine whether cause exists for such adjustments of level or type of coverage. The Department shall process an adjustment of the level of required coverage as if it were a permit modification under section 66270.41, subsection (a)(5) of this division and subject to the procedures of 66271.4 of this division. Notwithstanding any other provision, the Department may hold a public hearing at its discretion or whenever, on the basis of requests for a public hearing, a significant degree of public interest is expressed in a tentative decision to adjust the level or type of required coverage.

(e) Period of coverage. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Department shall notify the owner or operator in writing that he or she is no longer required by this section to maintain liability coverage for that facility, unless the Department has reason to believe that closure has not been in accordance with the approved closure plan.

(f) Financial test for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he or she passes a financial test as specified in this subsection. To pass this test the owner or operator shall meet the criteria of subsection (f)(1)(A) or (B) of this section.

(A) the owner or operator shall have:

1. net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

2. tangible net worth of at least $10 million; and

3. assets in the United States amounting to either:

a. at least 90 percent of total assets; or

b. at least six times the amount of liability coverage to be demonstrated by this test.

(B) the owner or operator shall have:

1. a current rating for his or her most recent bond issuance of AAA, AA, A or BBB as issued by Standard and Poor's, or Aaa, Aa, A or Baa as issued by Moody's; and

2. tangible net worth of at least $10 million; and

3. tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

4. assets in the United States amounting to either:

a. at least 90 percent of total assets; or

b. at least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase "amount of liability coverage" as used in subsection (f)(1) of this section refers to the annual aggregate amounts for which coverage is required under subsections (a) and (b) of this section and sections 67450.14 and 67450.15.

(3) To demonstrate that this test can be met, the owner or operator shall submit the following items to the Department:

(A) a letter signed by the owner's or operator's chief financial officer and worded as specified in section 66264.151, subsection (g). The letter shall be on the official letterhead stationery of the owner or operator, and shall contain an original signature. An owner or operator may use the financial test to demonstrate both assurance for closure or postclosure care, as specified in section 66264.143, subsection (f), section 66264.145, subsection (f), section 66265.143, subsection (e), section 66265.145, subsection (e) and section 67450.13, and liability coverage as specified in section 66264.147, subsection (a), section 66264.147, subsection (b), section 66265.147, subsection (a), section 66265.147, subsection (b), sections 67450.14 and 67450.15. If an owner or operator is using the financial test to cover both forms of financial responsibility, a separate letter is not required.

(B) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

(C) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

1. the independent certified public accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

2. in connection with that procedure, no matters came to the independent certified public accountant's attention which caused him or her to believe that the specified data should be adjusted.

(4) An owner or operator of a new facility shall submit the items specified in subsection (f)(3) of this section to the Department at least 60 days before the date on which hazardous waste is first received for transfer, treatment, storage or disposal.

(5) After the initial submission of items specified in subsection (f)(3) of this section, the owner or operator shall send updated information to the Department within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of subsection (f)(1) of this section, liability coverage shall be obtained for the entire amount of coverage as described in this section by use of the financial mechanisms described in this section. Notice shall be sent to the Department of the owner's or operator's intent to obtain the required coverage; notice shall be sent by either registered mail or by certified mail within 90 days after any occurrence that prevents the owner or operator from meeting the test requirements. Evidence of liability coverage shall be submitted to the Department within 90 days after any occurrence that prevents the owner or operator from meeting the requirements.

(7) The Department may, based on a reasonable belief that the owner or operator no longer meets the requirements of subsection (f)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (f)(3) of this section. If the Department finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (f)(1) of this section, the owner or operator shall provide alternate financial assurance for closure and postclosure care and evidence of the required liability coverage as specified in this section within 30 days after notification of such a finding.

(8) The Department may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his or her report on examination of the owner's or operator's financial statements (see subsection (f)(3)(B) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Department will evaluate other qualifications on an individual basis. The owner or operator shall provide evidence of liability coverage for the entire amount required as specified in this section within 30 days after notification of disallowance.

(9) The owner or operator is no longer required to submit the items specified in subsection (f)(3) of this section when:

(A) an owner or operator substitutes alternate financial assurance for closure and postclosure care and evidence of liability coverage as specified in this section; or

(B) the Department releases the owner or operator from the requirements of this section in accordance with section 66265.143, subsection (i), section 66265.145, subsection (i) and section 66265.147, subsection (e).

(g) Guarantee for liability coverage.

(1) Subject to subsection (g)(2) of this section, an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "guarantee." The guarantor shall be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor shall meet the requirements for owners or operators in subsections (f)(1) through (f)(9) of this section. The wording of the guarantee shall be identical to the wording as specified in section 66264.151, subsection (h)(2), and shall have original signatures. A certified copy of the guarantee shall accompany the items sent to the Department as specified

in subsection (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter shall describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter shall describe this "substantial business relationship" and the value received in consideration of the guarantee. The term of the guarantee shall provide as follows:

(A) if the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage.

(B) the guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Department. This guarantee shall not be terminated unless and until the Department approves alternate liability coverage complying with section 66264.147 and/or section 66265.147.

(2)(A) In the case of corporations incorporated in states other than California, a guarantee may be used to satisfy the requirements of this section only if the Attorney General or Insurance Commissioner of;

1. the State in which the guarantor is incorporated, and

2. each state in which a facility covered by the guarantee is located have submitted a written statement to the Department that a guarantee executed as described in this section is a legally valid and enforceable obligation in that State.

(B) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this section only if;

1. the non-U.S. corporation has identified a registered agent for service of process in each State in which a facility covered by the guarantee is located and in the State in which it has its principal place of business; and if

2. the Attorney General or Insurance Commissioner of each State in which a facility covered by the guarantee is located and the State in which the guarantor corporation has its principal place of business, has submitted a written statement to the Department that a guarantee executed as described in this section is a legally valid and enforceable obligation in that State.

(h) Letter of credit for liability coverage:

(1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit that conforms to the requirements of this subsection and submitting a copy of the letter of credit to the Department.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(3) The wording of the letter of credit shall be identical to the wording specified in section 66264.151, subsection (k) of this division. The letter of credit shall contain original signatures and shall be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, effective date, and providing the following information; the hazardous waste facility identification number, name and address of the facility, and the amount of funds assured for valid third party liability claims of the facility by the letter of credit.

(4) An owner or operator who uses a letter of credit to satisfy the requirement of this section may also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust shall be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the trustee. The trustee of the standby trust fund shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency. This standby trust fund shall meet all of the requirements of the trust fund specified in subsection (j) of this section.

(5) The wording of the standby trust fund shall be identical to the wording specified in section 66264.151, subsection (n).

(6) The letter of credit shall be irrevocable and issued for a period of at least on (1) year. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one (1) year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Department by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days shall begin on the date when both the owner or operator and the Department have received the notice, as evidenced by the return receipts.

(7) The letter of credit shall be issued in an amount at least equal to the required per occurrence and annual aggregate amount for sudden, or nonsudden, or sudden and nonsudden liability coverage, except as provided in subsection (b)(6) of this section.

(i) Payment bond for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by obtaining a payment bond that conforms to the requirements of this subsection and submitting a copy of the bond to the Department.

(2) The surety company issuing the bond shall be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the payment bond shall be identical to the wording specified in section 66264.151, subsection (*l*). The payment bond shall contain original signatures.

(4) A payment bond may be used to satisfy the requirements of this section only if the Attorney General or Insurance Commissioner of

(A) the State in which the surety is incorporated, and

(B) each State in which a facility/TTU covered by the payment bond is located have submitted a written

statement to the Department that a payment bond executed as described in this section and is a legally valid and enforceable obligation in that State.

(j) Trust fund for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this subsection by submitting an originally signed duplicate of the trust agreement and a formal certification of acknowledgment.

(2) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or state agency.

(3) The trust fund for liability coverage shall be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the fund, shall either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this subsection, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust agreement shall be identical to the wording specified in section 66264.151, subsection (m).

(k) Self-Insurance for Public Agencies.

(1) A public agency operating a household hazardous waste collection facility may demonstrate the required liability coverage by self-insuring as specified in this section, and by submitting evidence of such insurance to the Department.

(2) The public agency shall have:

(A) self-insurance;

(B) an active safety and loss prevention program that seeks to minimize the frequency and magnitude of third party damages caused by accidental occurrences and other self-insured losses; and

(C) procedures for and a recent history of timely investigation and resolution of any claims for third party damages caused by accidental occurrences and other self-insured losses.

(3) To demonstrate that self-insurance can be used, the public agency shall submit the following items to the Department at least 45 days before the date on which hazardous waste is first received. The insurance shall be effective before the initial receipt of hazardous waste:

(A) a Certificate of Self-Insurance shall be completed by utilizing only form DTSC 1165 (12/00), (Certificate of Self-Insurance), without making any changes to the form, which shall be provided by the Department; and

(B) a letter from the Chief Administrative Officer of the public agency which contains an original signature, stating that self-insurance is the chosen mechanism for liability coverage.

(4) If the public agency no longer meets the requirements of subsection (k)(2) of this section, notice shall be sent by either registered mail or certified mail within 30 days after any occurrence that prevents the public agency from meeting the self-insurance requirements. Alternative liability coverage shall be obtained for the entire amount of coverage as described in Section 67450.4, subsection (b) by using one of the other financial mechanisms described in this section. Evidence of the alternative liability coverage shall be submitted to the Department within 90 days after any occurrence that prevents the public agency from meeting the self-insurance requirements.

(5) The Department may, based on the reasonable belief that the public agency no longer meets the requirements of subsection (k)(2) of this section, require reports of financial condition and insurance policies at any time from the public agency in addition to those specified in subsection (k)(3) of this section. If the Department finds, on the basis of such reports or other information, that the public agency no longer meets the requirements of subsection (k)(2) of this section, the public agency shall provide alternate financial assurance for liability coverage as specified in this section within 30 days after notification of such a finding.

(*l*) Liability Coverage--Alternative Mechanism.

(1) An owner or operator of a facility or facilities where solely non-RCRA hazardous waste is managed, a Transportable Treatment Unit (TTU) operated pursuant to section 67450.2(a) and/or a Fixed Treatment Unit (FTU) operated pursuant to section 67450.2(b), may demonstrate the required liability coverage by means of a mechanism other than those specified in subsections (a) and (b) of this section, provided that, prior to its use, the proposed mechanism has been submitted to and approved by the Department. The mechanism shall be at least equivalent to the mechanisms specified in subsections (a) and (b) of this section. The Department shall evaluate the equivalency of a mechanism principally in terms of:

(A) certainty of the availability of funds for the required liability coverage; and

(B) the amount of funds that will be made available;

(C) the Department shall also consider other factors deemed to be appropriate, and shall require the owner or operator to submit additional information as is deemed necessary to make the determination.

(2) The owner or operator shall submit to the Department the proposed mechanism together with a letter requesting that the alternate mechanism be considered acceptable for meeting the requirements of subsections (a) and (b) of this section and sections 67450.14 and 67450.15. The submission shall include the following information:

(A) the name, address and phone number of the issuing institution; and

(B) hazardous waste facility identification number, name, address and the amount of liability, TTU or FTU

coverage to be provided for each facility; and

(C) the terms of the proposed mechanism (period of coverage, renewal/extension, cancellation).

(3) The Department shall notify the owner or operator in writing of the determination made regarding the proposed mechanism's acceptability in lieu of the other mechanisms specified in subsections (a) and (b) of this section and sections 67450.14 and 67450.15.

(4) If a proposed mechanism is found acceptable, the owner or operator shall submit a fully executed document to the Department. The document shall contain original signatures and shall be accompanied by a formal certification of acknowledgment.

(5) If a proposed mechanism is found acceptable except for the amount of coverage, the owner or operator shall either increase the coverage or obtain other liability coverage as specified in subsections (a) and (b) of this section and sections 67450.14 and 67450.15. The amount of coverage available through the combination of mechanisms shall at least equal the amounts required by subsections (a) and (b) of this section and sections 67450.14 and 67450.15.

NOTE: Authority cited: Sections 25150, 25159, 25159.5, 25245, 58004 and 58012, Health and Safety Code. Reference: Sections 25200.1 and 25245, Health and Safety Code; 40 CFR Section 265.147.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).
2. Amendment of subsections (g) and (l) filed 10-23-91; operative 1-1-92 (Register 92, No. 12).
3. Amendment of section and Note filed 4-12-93; operative 4-12-93 (Register 93, No. 16).
4. Change without regulatory effect amending section filed 8-17-95 pursuant to section 100, title 1, California Code of Regulations (Register 95, No. 33).
5. Amendment of Note filed 10-13-98; operative 11-12-98 (Register 98, No. 42).
6. Amendment of subsections (a) and (b) and amendment of Note filed 10-19-98; operative 11-18-98 (Register 98, No. 43).
7. Change without regulatory effect amending subsections (b), (b)(8)(B)-(C), (f)(3)-(f)(3)(B) and (g)(3)(A)-(C), new (g)(4), subsection renumbering and amendment of subsections (h)(1)-(h)(2)(B), (i)(3), (i)(4)(A), (i)(5), (j)(3)-(4), (k)(4) and (*l*)(3)(A) filed 11-6-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 45).
8. Change without regulatory effect amending section filed 12-19-2005 pursuant to section 100, title 1, California Code of Regulations (Register 2005, No. 51).

§66265.148. Incapacity of Owners or Operators, Guarantors, or Financial Institutions.

(a) An owner or operator shall notify the Department by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A guarantor of a guarantee as specified in section 66265.143(e) and 66265.145(e) shall make such a notification if named as debtor, as required under the terms of the guarantee.

(b) An owner or operator who fulfills the financial assurance or liability coverage requirements by obtaining a trust fund, surety bond, letter of credit, or insurance policy shall be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator shall establish other financial assurance or liability coverage within 60 days after such an event.

NOTE: Authority cited: Sections 208, 25150, 25159, 25159.5 and 25245, Health and Safety Code. Reference: Section 25245, Health and Safety Code; 40 CFR Section 265.148.

HISTORY

1. New section filed 5-24-91; operative 7-1-91 (Register 91, No. 22).

